MALAKOFF BHD & ANOR

v.

PENTADBIR TANAH, KEDAH

FEDERAL COURT, KUALA LUMPUR
HAIDAR MOHD NOOR CJ (MALAYA)
ABDUL MALEK AHMAD FCJ
ABDUL HAMID MOHAMAD FCJ
[CIVIL APPEAL NO: 01-5-2002 (K)]
11 DECEMBER 2003

LAND LAW: *Acquisition of land - Compensation - Quantum, adequacy of - Injurious affection - Whether learned judge applied correct principles - Land Acquisition Act 1960*

In these appeal and cross-appeal, the primary issue that arose was whether the award of RM10,000 per acre that the learned judge had allowed the appellants in respect of the acquisition of their land ('the scheduled land') pursuant to the provisions of the Land Acquisition Act 1960 ('the Act') vide gazette notification dated 3 March 1994 constituted the market value of the scheduled land. It was not in dispute that the learned judge, in coming to his assessment, had adopted the valuation as proposed by the respondent and rejected the appellants' valuation which stood at RM20,000 per acre. Before the learned appellate judges, the cross-appeal became all the more significant as the respondent had adduced additional evidence, not hitherto disclosed, that the appellants, just months prior to the acquisition, had entered into a sale and purchase agreement with a third party to sell part of the scheduled land at a market value price of RM7,040 per acre. In the circumstances, a further question arose as to whether the learned judge had erred in law and in fact by way of failing to take into consideration the relevant factors when assessing the market value of the scheduled land.

Held:
Per Haidar Mohd Noor CJ (Malaya)

[1] The sale and purchase agreement and the other documents in respect of the scheduled land are material evidence for the purpose of assessing the market value by the Land Administrator and the High Court, especially when there is evidence of sale of half of the scheduled land and the basis of the market value of its sale. (p 207 g)

[2] Had the learned judge the benefit of the documents produced by way of additional evidence in support of the respondent's cross-appeal, the learned judge could very well have not affirmed the award of RM10,000 per acre. (p 208 f-g)

[3] In view of the proximity of time between the sale and purchase agreement of the scheduled land and the date of the acquisition of the scheduled land, the sale and purchase agreement provides the best guide for assessment of the market value of the scheduled land after making due allowance for all the circumstances. This being the case, the respondent's award and the High Court order affirming it should be set aside. (p 209 d-f)

[4] There was an intervening period of 7 months between the date of the sale and purchase agreement and that of the acquisition. In the circumstances, bearing in mind the element of appreciation of the scheduled land, RM7,500 per acre should be a fair market value of the scheduled land. As for injurious affection, the amount should only be RM5,000 and not RM9,300 as quantified by the learned judge. (p 209 g-h)

[Appeal dismissed; cross appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes*

Dalam rayuan dan rayuan balas di sini, isu utama yang berbangkit adalah sama ada award RM10,000 se ekar yang dibenarkan kepada perayu oleh yang arif hakim bagi pengambilan tanah perayu ('tanah berjadual') di bawah peruntukan Akta Pengambilan Tanah 1960 ('Akta') melalui gazet pemberitahuan bertarikh 3 Mac 1994 merupakan nilai pasaran tanah berjadual tersebut. Tidak dinafikan bahawa yang arif hakim, dalam mencapai taksirannya, telah menerima taksiran yang dicadangkan oleh responden sekaligus menolak taksiran perayu yang dibuat pada kadar RM20,000 se ekar. Di hadapan yang arif hakim-hakim rayuan, rayuan balas responden menjadi semakin penting oleh kerana responden telah mengemukakan keterangan baru, yang tidak dikemukakan sebelumnya, bahawa perayu, cuma beberapa bulan sebelum pengambilan tanah berjadual, telah memeterai satu perjanjian jual beli bagi menjual tanah berjadual kepada satu pihak ketiga pada harga pasaran RM7,040 se ekar. Dalam keadaan sedemikian, persoalan telah juga berbangkit sama ada yang arif hakim telah silap di sisi undang-undang dan fakta kerana gagal mengambilkira pertimbangan-pertimbangan yang relevan bila mentaksir nilai pasaran tanah berjadual.

Diputuskan:
Oleh Haidar Mohd Noor HB (Malaya)

[1] Perjanjian jual beli dan dokumen-dokumen lain mengenai tanah berjadual adalah keterangan material bagi maksud pentaksiran nilai pasaran oleh Pentadbir Tanah dan Mahkamah Tinggi terutama apabila wujud keterangan berkenaan penjualan separuh tanah berjadual serta asas-asas nilai pasaran bagi penjualan tersebut.

[2] Sekiranya yang arif hakim mendapat manfaat dokumen-dokumen yang dikemukakan melalui keterangan tambahan bagi menyokong rayuan balas responden, yang arif hakim berkemungkinan tidak akan mengesahkan award RM10,000 se ekar tersebut.

[3] Mengambilkira kehampiran masa antara tarikh perjanjian jual beli dengan tarikh pengambilan tanah berjadual, perjanjian jual beli adalah panduan terbaik bagi pentaksiran nilai pasaran tanah berjadual selepas mempertimbang semua halkeadaan-halkeadaan. Dengan hal yang demikian, award oleh responden serta perintah Mahkamah Tinggi yang mengesahkan award tersebut harus diketepikan.

[4] Tujuh bulan telah berlalu antara tarikh perjanjian jual beli dengan tarikh pengambilan. Mengambilkira faktor ini, serta faktor kenaikan harga tanah, RM7,500 se ekar adalah nilai pasaran yang adil bagi tanah berjadual. Bersabit kemudaratan pada nilai/injurious affection, amaun yang sepatutnya adalah RM5,000 dan bukannya RM9,300 seperti yang ditaksir yang arif hakim.

Rayuan ditolak; rayuan balas dibenarkan; perintah sekadarnya.]

Case(s) referred to:

Alagappa Chettiar v. Collector of Land Revenue, Kuala Lumpur [1968] 1 MLJ 243 ***(refd)***

Collector of Land Revenue v. Alagappa Chettiar [1971] 1 MLJ 43 ***(refd)***

Ezra v. Secretary of State for India [1905] ILR 32 Cal 605 ***(dist)***

Hamidon Ahmad v. Collector of Land Revenue, Jasin [1970] 1 MLJ 202 ***(dist)***

Harish Chundar Neogy v. Secretary of State 11 CWN 876 ***(refd)***

Nanyang Manufacturing Co v. The Collector of Land Revenue, Johore [1954] 20 MLJ 69 ***(refd)***

Ng Tiou Hong v. Collector of Land Revenue, Gombak [1984] 2 MLJ 35 ***(refd)***

Petaling Rubber Estates Ltd v. Collector of Land Revenue, Kedah [1989] 3 MLJ 438 ***(refd)***

Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co Ltd [1966] 1 MLJ 243 ***(refd)***

United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah & Other Applications [2002] 4 CLJ 177 FC ***(refd)***

Legislation referred to:
Land Acquisition Act 1960, ss. 3, 8, 29(2), 37(1), 49(1)
Rules of the Federal Court 1995, r. 137

Other source(s) referred to:
Aggarawala, *Compulsory Acquisition of Land*, 1985, 5th edn, p 529, para 75
Om Prakash Aggarawala, *Land in India*, pp 301 306, para 30
Sanjiva Row, *Land Acquisition and Compensation*, 1984, 7th edn, p 728

For the appellant - Wong Chong Wah (Lim Koon Huan); M/s Skrine
For the respondent - Aziah Ali DPP

[Appeal from High Court Alor Setar; Land Reference No: 15-47-1995]

Reported by WA Sharif

JUDGMENT

Haidar Mohd Noor CJ (Malaya):
There are three matters before us. They are:

(1) The notice of motion dated 1 July 2003 for leave to adduce further evidence by the respondent in support of the respondent's cross-appeal.

(2) The appeal by the appellants.

(3) The cross-appeal by the respondent.

We will deal with the matters in the order as set out above.

Notice Of Motion Dated 1 July 2003
The notice of motion was filed after this court granted leave on 16 June 2003 to the respondent to file a cross-appeal in respect of the appeal by the appellants filed on 1 October 2002.

The ground for the filing of the motion is to adduce further evidence in the form of documents byway of affidavit. With the introduction of the further evidence, the respondent hoped to show that the appellants were over compensated by the award of RM10,000 per acre for the acquired land. Hence, the basis for the respondent's cross-appeal.

Wong Chong Wah of counsel for the appellants at the initial stage of the proceedings objected to the motion. This is borne out by the affidavit in reply of one Ahmad Azhar Shah bin Ibrahim, the Legal and Administrative Manager of Boustead Estates Agency Sdn. Bhd, the managing agents of the appellants.

In this affidavit, Ahmad Azhar Shah bin Ibrahim deposed that there was no suppression or deliberate suppression by the appellants and further deposed that the documents relied on by the respondent byway of further evidence in support of the cross-appeal were not required to be produced in the land acquisition proceeding and the respondent had failed to show how the documents are relevant to the cross-appeal before us. The documents referred to are:

(a) the Sale of Estates, other Assets and Shares Agreement dated 8 October1993 between the first appellant and Kuala Sidim Rubber Company Berhad ('the sale and purchase agreement');

(b) the first appellant's circular to its shareholders dated 23 February 1994;

(c) Kuala Sidim Rubber Company Berhad's circular to its shareholders dated 3 March 1994;

(d) the official Land Title Search Reports for Lot No. 14215 (old Lot No. 8065) and Lot No. 18479.

The above documents are exhibited as ZBH1, ZBH2, ZBH3 and ZBH4 respectively in the affidavit of Zabudin bin Hat, Chief Assistant Director of Land and Mines, Kedah in support of the motion and the cross-appeal of the respondent.

The same documents are also exhibited in the second affidavit of the respondent through Azmi bin Abdul Latif, a valuation officer of the Jabatan Penilaian dan Perkhidmatan Hartanah, Taiping, Perak Darul Ridzuan who was previously stationed at the branch office, Sungai Petani, Kedah Darul Aman and who was responsible for preparing a valuation report for the respondent. (exhs. AAL1 to AAL4).

In the midst of the submission of Aziah Ali, the learned State Legal Adviser of Kedah appearing for the respondent, Abdul Malek Ahmad, FCJ, interjected and intimated to Wong Chong Wah of counsel for the appellants whether he still wished to stand by his objection to the motion as clearly it would be better for the documents to be put in as the said documents would be relied on as the basis for the respondent to argue in the cross-appeal. The appellants would not in anyway be prejudiced and there would be an opportunity for the appellants to argue as per the grounds opposing the motion. It would also save time in arguing all over again in the event the motion is allowed by the court.

Wong Chong Wah of counsel for the appellants relented and withdrew his objection. We accordingly made an order in terms of the motion. We then directed Wong Chong Wah of counsel for the appellants to proceed with the appeal.

The Appeal

This court allowed the extension of time for the appellants to appeal against the decision of the High Court due to the uncertainties regarding the appropriate appellate court. Initially the appellants filed their appeal in the Court of Appeal. In fact the Court of Appeal heard their appeal and dismissed it but allowed the claim for injurious affection (see [2000] 2 MLJ 140). However, this issue has been resolved by this court in the case of *United Malacca Bhd. v. Pentadbir Tanah Daerah Alor Gajah and Other Applications* [2002] 4 CLJ 177. In respect of the appellants' case, the proper appellate court is the Federal Court. In the interests of justice, this court similarly allowed the extension of time for the respondent to file a cross-appeal (see r. 137 of the Rules of the Federal Court 1995).

This appeal is against the refusal of the learned judge to increase the award of RM10,000 per acre by the respondent in respect of the acquisition of the land belonging to the appellants. The appellants claim that the sum awarded is not reflective of the market value of the scheduled land. The appellants contended that a sum of RM20,000 per acre should have been awarded instead of RM10,000 per acre. Apart from that, the appellants contended that the learned judge failed to consider the appellants' claim for injurious affection in the sum of RM9,300. The material date for determining the market value of the scheduled land is 3 March 1994. This is the date of the declaration of intended acquisition pursuant to s. 8 of the Land Acquisition Act 1960 ('the Act') and published in the Government of Kedah Darul Aman Gazette Notification on 3 March 1994 vide Gazette Notification No. 170. The purpose of the acquisition as stated in the Gazette Notification is:

> Pengambilan Tanah Untuk Menyelesaikan Masalah Setinggan di Bandar Sungai Petani.

The scheduled land formed part of Kellang Lama and Home Divisions of Kuala Muda Estate totaling 6,392.16 acres. The scheduled land formed part of Lot Nos. 14215 and 18479, Mukim of Sungai Petani, District of Kuala Muda. 1,661.5 acres of Lot No. 14215 out of the original area of 1,709.9688 acres and 919.9 acres of Lot No. 18479 out of the original area of 940.48 acres were acquired for the stated purpose.

The main contention of the appellants is that the learned judge erred in law and in fact in failing to take into consideration the relevant factors in assessing the market value of the scheduled land.

For a start, the learned judge, in our view, had taken the correct approach in considering the principles in awarding compensation for the acquisition of the scheduled land by referring to the First Schedule to the Act where the compensation is to be determined according to the market value of the scheduled land at the time of the gazette notification. In this case the relevant date is 3 March 1994. As to what is the market value, the learned judge relied on the Federal Court case of *Ng Tiou Hong v. Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 as a guide and quoted what Syed Agil Barakbah, FJ, stated at p. 37:

> There are of course other principles that have to be applied according to the facts and circumstances of a particular case along the lines provided by the First Schedule to the Act and as decided from time to time by the courts. We consider the following as the main principles:
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> > First, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future eg, the possibility of it being used for building or other developments. Fourthly, in considering the nature of the land regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given unless it is supported by, or coincides with, other evidence ...
>
> > The safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition. The prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.

From the notes of the proceedings before the learned judge, no oral evidence was led by either party but the parties relied on the following documents:

(a) the valuation report of the appellants dated 25 April 1994 marked as exh. 'A';

(b) the valuation report of the respondent dated 8 August 1995 marked as exh. 'B';

(c) the common plan marked as exh. 'C';

(d) the affidavit of Azmi bin Abdul Latif, the government valuation officer, filed on behalf of the respondent enclosing the valuation reports dated 6 August 1993 ('first valuation report') and 25 April 1994 ('second valuation report') respectively by Messrs Azmi & Co for the appellants.

Hence, the issue of the credibility of witnesses in this case does not arise in considering the appeal before us.

The following facts as found by the learned judge are not disputed.

2,581.4 acres out of a total area of 2,650.4488 acres of the scheduled land belonging to the appellants were acquired and the purpose of the acquisition was for "menyelesaikan masalah setinggan di Bandar Sungai Petani" ("to resolve the squatter problems in the town of Sungai Petani"). As the date of the gazette notification for the acquisition is 3 March 1994, for the purpose of determining the market value of the scheduled land, the relevant date would be 3 March 1994. The scheduled land are freehold and under the category of agriculture. The scheduled land is still under the agriculture zone according to the Kedah Town and Country Planning Department. As at the date of acquisition, there has been no application by the appellants for the development of the scheduled land.

With the above background, the learned judge proceeded to consider the market value of the scheduled land based on the comparison of sales method used by the appellants' valuer as in exh. 'A'. Likewise, the respondent's valuer also used the comparable of sales method as in exh. 'B'.

From exh. 'A', the appellants' valuer put forward four comparable sales. The first comparison is the same as comparison three used by the respondent's valuer. It is in respect of Lot 1029 and other lots covering an area of 555.633 acres. The transaction was around RM13,500 per acre on 22 July 1990. After considering in detail and giving the necessary allowances, the learned judge concluded the market value of the scheduled land is RM10,150 per acre. According to the learned judge, this is about the best comparison.

In respect of comparison 2, 3 and 4, the lands are situated in the District of Kulim and it is clear that the lands are close to Penang which has been developed. According to the learned judge, for comparison 3 and 4 the transactions took place almost at the same time as comparison 1 and at almost the same price. As stated by the valuer for the appellants, comparison 3 and 4 are close to Kulim town and the lands were acquired for the new township of Kulim and are under the Kulim Industrial Zone. If the necessary adjustments are made, the market value at the material date for the purpose of comparison would be the same as comparison 1, that is, RM10,150 per acre.

In respect of comparison 2, the learned judge could not accept the market value based on the sale and purchase agreement dated 9 March 1994, as from exh. 'A' the said sale and purchase agreement was not produced and there was no evidence when the transfer took place, if at all. In the circumstances, the learned judge took the view that he could not accept this comparison in assessing the market value of the scheduled land as he was not in a position to consider the terms and conditions of the said sale and purchase agreement.

The respondent as per exh. 'B' relied on eight comparisons. For the reasons stated by the learned judge, which we agree, he rejected comparison 1 and 2 as at the time of the transaction, the lands were already zoned under industrial use.

Comparison 3 is the common comparison by both valuers as stated by the learned judge in his judgment, that is, the market value is RM10,150 per acre.

In respect of comparison 4, after giving due allowances, the learned judge put the market value as RM9,700 per acre for comparison purposes.

The learned judge rejected comparison 6 as the lands are situated far away from the scheduled land and they are in the interior.

According to the learned judge comparison 5, 7 and 8 are good for comparison as the lands are situated near the scheduled land. For the reasons stated therein, the learned judge concluded that the market value for comparison 5 is RM9,000 per acre.

In respect of comparison 7 and 8, after giving due allowances in terms of size, type of lands etc, the learned judge assessed the market value as RM8,400 per acre.

a After considering the valuation reports of the valuers of both parties, the learned judge came to the finding that the market value of the scheduled land was approximately RM9,000 per acre. The learned judge thereafter commented that the respondent awarded RM10,000 per acre to the appellants which was more than the market value as found by him. In spite of his finding, the learned b judge followed the award by the respondent and declined to increase the compensation to the appellants. In declining to increase the award, the learned judge observed that based on the market value as in the report prepared by the same valuer of the appellants (exh. 'D') for the purpose of the Securities Commission as RM7,040 per acre, and the award at RM10,000 per acre, the c market value of the scheduled land exceeded the Securities Commission valuation by about RM3,000 per acre. Exhibit 'D' was put in by the respondent.

Before us, Wong Chong Wah of counsel for the appellants contended that the learned judge erred in law and in fact in rejecting comparison 2 of the appellants' valuation report (exh. 'A') as it is the best comparable indicating d the market value of the scheduled land as it involves the sale of a 5082 acre estate at RM22,800 per acre and which is similar to the scheduled land. The said sale and purchase agreement dated 9 March 1994, is barely one week from the acquisition date. After giving due allowances, the appellants' valuer put the market value of the scheduled land at RM20,000 per acre which worked e out to a total sum of RM51,628,000 for the acquired land.

The learned judge rejected this evidence primarily on the ground that the said sale and purchase agreement was not produced by the appellants nor exhibited in the valuation report of the appellants (exh. 'A'). There is no evidence of when the transaction took place if compared to comparison 1 where the f transaction was stated clearly as 22 July 1990. The learned judge, in our view, was correct to say that in the absence of the said sale and purchase agreement, he was unable to examine the terms and conditions of the sale and purchase and further there is no evidence that the sale and purchase was carried into effect.

g We would add further that the parties to the said sale and purchase agreement are not known either. It then goes down to the issue of whether the said sale and purchase agreement was *bona fide*! Only when the agreements to purchase are *bona fide* and other tests applicable to actual sales are satisfied would the comparison give an indication of the market value. (see *Compulsory Acquisition* h *of Land in India* by Aggarawala (1985) 5th edn. at p. 529, para. 75 and Sanjiva Row on *Land Acquisition And Compensation* (7th edn.) 1984 p. 728). In the circumstances, the learned judge was not wrong in rejecting the evidence of the said sale and purchase agreement.

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Wong Chong Wah of counsel for the appellants further submitted that the learned judge erred in law and in fact by taking into consideration the first valuation report prepared by the appellants' same valuer for the purpose of the Securities Commission which is exhibited as exh. 11 to the affidavit of the respondent's valuer dated 16 September 1995. The valuation was in respect of the whole of lots known as Ladang Kuala Muda and valued at RM7,040 per acre. In respect of the schedule land which formed part of Ladang Kuala Muda, the area acquired is 2,581.4 acres and the market value was put at RM20,000 per acre by the second valuation report of the appellants.

The learned judge observed that the period between the two valuation reports is around seven months and during this short period, the difference in the market value of the scheduled land is about RM13,000 per acre.

There was no explanation for the apparent abrupt difference in the market value of the scheduled land. Further, there was no evidence either to show of any development in or around the area of the scheduled land. In the interests of justice, the learned judge gave the appellants' valuer the opportunity to explain the apparent abrupt difference in the valuation of the scheduled land and adjourned the hearing to another date. However, at the continued hearing, the appellants' valuer did not turn up in court and no explanation was put forward by the appellants for the absence of their valuer!

In the circumstances the learned judge, in our view, is entitled to state that the market value of the scheduled land should be RM7,040 per acre as per the first valuation report as opposed to the second valuation report putting the market value at RM20,000 per acre. Surprisingly though, the learned judge apparently failed to give adequate consideration to the first valuation report as it is clear that he was not influenced by it and merely, as it would appear, affirmed the award made by the respondent. It is therefore not correct for Wong Chong Wah of counsel for the appellants to contend that the learned judge erred in law and in fact in taking into consideration the first valuation report prepared for the purpose of the Securities Commission.

Even assuming for a moment that the learned judge was influenced by the first valuation report which was for the purpose of the Securities Commission as contended by the appellants and relying on what Lim Beng Choon, J said in *Petaling Rubber Estates Ltd. v. Collector of Land Revenue, Kedah* [1989] 3 MLJ 438 at p. 444: 'Hence such valuations can at the highest be utilized as an informative guide and not as an indication of the price which a willing seller would sell and a willing purchaser would buy the land in question', the acid test, in our view, is the method of valuation adopted by the valuer. We have examined in details the first valuation report prepared by the appellants' valuer

for the purpose of the Securities Commission. At p. 155 of the Appeal Record, the appellants' valuer stated the purpose of the valuation and more importantly the basis of valuation and we quote:

> The basis of valuation, for the purposes of this report, is on OPEN MARKET VALUE. By OPEN MARKET VALUE is meant the best price at which the sale of an interest in a property might reasonably be expected to have been completed unconditionally for cash consideration on the date of valuation assuming:
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> (a) a willing seller;
>
> (b) that prior to the date of valuation there had been a reasonable period (having regard to the nature of the property and the state of the market), for the proper marketing of the interest, for the agreement of price and terms and for the completion of the sale;
>
> (c) that the state of the market, level of values and other circumstance were, on any earlier assumed date of exchange of contracts, the same as on the date of valuation;
>
> (d) that no account is taken of an additional bid by a purchaser with a 'special interest'.

The appellants' valuer used the same basis for the market value of the scheduled land for the purpose of the acquisition of the scheduled land in the second valuation report. (p. 130 of the Appeal Record).

It is thus clear that the basis of the valuation adopted for the purpose of the Securities Commission and for the acquisition purpose under the Act in this case is the same. It was urged upon us by Wong Chong Wah of counsel for the appellants that the two valuation reports should be treated differently in this case. With respect, we disagree. We must say that surely there cannot be one standard of valuation for the purpose of the Securities Commission and another standard for the acquisition purpose if clearly the method used for the two valuation reports in respect of the same land is the same, that is, the open market value and willing seller and willing buyer. For that matter, the two valuation reports were even prepared by the same valuer, that is, S. Gopala Krishnan who is from the same firm!

However, we wish to point out that the learned judge is not bound to accept the expert opinion of either party as to the market value in a land reference matter. In *Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore* [1954] 20 MLJ 69 Buhagiar, J in considering the evidence of experts at p. 71 quoted with approval the case of *Harish Chundar Neogy v. Secretary*

of State, 11 C.W.N. 876 at p. 877, "estimates are undoubtedly some evidence but their value is not great, as expert opinion is liable to err, unless it is supported by, or coincides with, other evidence."

This observation has been adopted with approval by the Federal Court in *Alagappa Chettiar v. Collector of Land Revenue, Kuala Lumpur* [1968] 1 MLJ 243 and *Ng Tiou Hong v. Collector of Land Revenue Gombak (supra).*

An opportunity was rightly given by the learned judge for the appellants to explain the apparent abrupt difference in the two valuation reports of the same valuer of the appellants as stated earlier but the appellants chose not to seize the opportunity to do so. Hence, there was no justification for the appellants to seek for an increase of the award to RM20,000 per acre. In the circumstances, we agree with the learned judge when he rejected the application for an increase to RM20,000 per acre for the scheduled land.

In respect of the claim for injurious affection as provided under the First Schedule to the Act, the learned judge merely mentioned in passing that the appellants in addition thereto claimed for a sum of RM9,300 per acre under this category. The appellants are now claiming for this sum. With respect, the learned judge incorrectly stated that the claim was on a per acre basis as clearly from the second valuation report this is what the valuer stated (pp. 138/139 of the Appeal Record):

> However, an area of approximately 1.55 acres on Lot No. 51 located immediately at the Southeast corner of the acquired site would be cut off from the remaining part of the estate and administration of this area would be difficult. We are, therefore, of the view that there would be a depreciation of about 30% of the open market value:
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> | | |
> |---|---|
> | Value of land before acquisition | RM20,000.00 per acre |
> | Value of land after acquisition | RM14,000.00 per acre |
> | Difference in value | RM6,000.00 per acre |
> | Area Affected | (x) 1.55 acres |
> | Value of Injurious Affection | RM 9,300.00 |

However, if we were to take the market value of the scheduled land before the acquisition as RM10,000 per acre instead of RM20,000 per acre the value of injurious affection, using the formula of 30% depreciation, would be around RM4,650 (half of RM9,300).

As this claim is not resisted by the respondent, such claim should have been considered by the learned judge. However, the amount to be considered depends on our decision in respect of the cross-appeal by the respondent.

Cross-Appeal

Pursuant to this court granting on 30 September 2002 leave to the appellants for extension of time to file the appeal against the judgment of the High Court, the respondent filed a motion on 25 October 2002 for leave of this court to file a cross-appeal out of time against the judgment of the High Court. On 16 June 2003 this court granted leave to the respondent to file and serve the cross-appeal. The cross-appeal was subsequently filed by the respondent on 25 June 2003.

The crux of the appeal and the cross-appeal relate to the primary issue of whether the amount of compensation awarded by the respondent and affirmed by the learned judge was reflective of the market value of the scheduled land as at 3 March 1994, the date of the publication of the Gazette under s. 8 of the Act (para. 1 of the First Schedule to the Act).

The appellants contended that the market value of the acquired land should be RM20,000 per acre and not RM10,000 per acre as awarded. The respondent on the other hand disputed this and contended that the award of RM10,000 per acre was not reflective of the market value of the scheduled land. The onus then is on the respondent and this the respondent tried to do by adducing further evidence, that is, by relying on the four documents produced in the motion filed on 1 July 2003 in support of the cross-appeal.

Before considering the merits of the cross-appeal, Wong Chong Wah of counsel for the appellants, whilst conceding that under s. 49(1) of the Act the respondent has a right to file an appeal or cross-appeal against the judgment of the High Court, however, submitted that in the circumstances of this case, the respondent has no basis to file the cross-appeal. The circumstances referred to are:

(a) the award of RM10,000 per acre that was upheld and maintained by the High Court was made by the respondent himself. Reference was made to s. 36(2) of the Act pertaining to reference to the High Court by the respondent as the Land Administrator and s. 37(1) of the Act pertaining to persons interested which by definition under s. 2 does not include the Land Administrator;

(b) section 44 of the Act provides that the scope of the inquiry shall be restricted to a consideration of the interests of the persons affected by the objection and by definition 'person interested' would exclude the Land Administrator;

(c) section 14(2) of the Act provides that the award of the Land Administrator shall be final and conclusive evidence of the area of any scheduled land, of its value in the opinion of the Land Administrator. The award of the Land Administrator is like an offer and binds the Government, as the Land Administrator is the agent of the Government.

Wong Chong Wah of counsel for the appellants relied on *Compulsory Acquisition of Land in India* by Om Prakash Aggarawala at p. 301 para. 30; p. 306 s. 12, and cited *Hamidon bin Ahmad v. Collector of Land Revenue; Jasin* [1970] 1 MLJ 202 at pp. 204 and 205 and *Ezra v. Secretary of State for India* [1905] ILR 32 Cal. 605 (Privy Council) at pp. 619, 620, 626 and 629, in support thereof.

However, we wish to respectfully say that the facts of this case and what was relied on by Wong Chong Wah of counsel for the appellants as stated above are different. If the appellants had not taken the further steps pursuant to s. 37 of the Act to apply to the High Court objecting to the amount of compensation awarded then, in our view, the matter rests there and the respondent cannot proceed further. In other words, the respondent as the Land Administrator cannot invoke s. 37 of the Act. The award made by the Land Administrator is then final and conclusive and is therefore binding on the Government subject to the total amount of any award not exceeding RM15,000 otherwise the Government or any person or corporation on whose behalf the scheduled land was acquired pursuant to s. 3 of the Act shall be deemed to be a person interested under sub-s. (1) of s. 37 and may make objection on any of the grounds specified in sub-s. (1) thereof. It would be helpful to quote s. 37 as follows:

37. Application to Court.

(1) Any person interested in any scheduled land who, pursuant to any notice under section 10 or 11, has made a claim to the Land Administrator in due time and who has not accepted the Land Administrator's award thereon, or has accepted payment of the amount of such award under protest as to the sufficiency thereof, may, subject to this section, make objection to:

(a) the measurement of the land;

(b) the amount of the compensation;

(c) the persons to whom it is payable;

(d) the apportionment of the compensation.

(2) Where the total amount awarded in compensation in respect of any interest in any scheduled land does not exceed three thousand ringgit the written award of the Land Administrator shall be final with regard to both the measurement of the land and the amount of compensation awarded, and no objection may be made under subsection (1) in respect thereof.

(3) Where the total amount of any award in respect of any scheduled land exceeds fifteen thousand ringgit any Government or any person or corporation undertaking a work which in the opinion of the State Authority is of public utility, and on whose behalf such land was acquired pursuant to section 3, shall be deemed to be a person interested in any scheduled land under subsection (1), and may make objections on any of the grounds specified in subsection (1).

To that limited extent, Wong Chong Wah of counsel for the appellants may be right. Since in this case, the appellants proceeded to file an appeal against the judgment of the High Court, the respondent is entitled to file an appeal or a cross-appeal. This right is amply given to the respondent by way of s. 49(1) of the Act and rightly conceded to by Wong Chong Wah of counsel for the appellants. Section 49(1) of the Act reads:

Any person interested, **including the Land Administrator** and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Federal Court. (emphasis is added)

We would, however, wish to say that without the benefit of the further evidence, the respondent would be hard put to cross-appeal as the sum of RM10,000 per acre was the sum awarded by the respondent as the Land Administrator.

In this respect, the Privy Council in *Collector of Land Revenue v. Alagappa Chettiar* [1971] 1 MLJ 43 per Lord Diplock stated at p. 44:

Although upon referring an objection to the High Court for its determination the collector is required to state the grounds on which the amount of compensation was determined, *the reference to the High Court is not in the nature of an appeal for the collector's award. It is in the nature of an original hearing in which the applicant is the plaintiff and the collector the defendant.* (emphasis is added)

We agree with what Lord Diplock said as to the status of the parties before the High Court in matters pertaining to acquisition of lands under the Act. As the reference to the High Court is not in the nature of an appeal but in the nature of an original hearing, it must necessarily follow that the award given by the respondent is not binding on the High Court though it would be final and binding on the Government if there is no reference to the High Court under

s. 37 of the Act. Similarly, the evidence of estimates of value by experts are undoubtedly some evidence but too much weight should not be given unless it is supported by, or coincides with, other evidence. In other words, the High Court is not bound by the expert valuation of the acquired land (*Ng Tiou Hong v. Collector of Land Revenue, Gombak) (supra)*. The safest guide would be the sales of the same land or similar land in the neighbourhood, after making due allowance for all the circumstances. *(Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johor) (supra).*

As stated earlier on, by consent of the parties, the following documents were allowed to be put in by the respondent in support of the cross-appeal:

(a) the Sale of Estates, other Assets and Shares Agreement dated 8 October 1993 between the first appellant and the Kuala Sidim Rubber Company Berhad ('the sale and purchase agreement');

(b) the first appellant's circular to its shareholders dated 23 February 1994; ("MB's circular")

(c) Kuala Sidim Rubber Company Berhad's circular to its shareholders dated 3 March 1994; ("KSB's Circular")

(d) the official Land Title Search Reports for Lot No. 14215 (old Lot No. 8065) and Lot No. 18479.

It is not disputed that the above said documents were not produced either in the inquiry before the respondent nor before the High Court. The issue here is whether the said documents are relevant for the purpose of considering the cross-appeal. The respondent contended that they are relevant and not available to the respondent at the time of the inquiry and the High Court proceedings. Reasons were put forward by the respondent

in the affidavits in support of the motion to adduce further evidence. It would appear that the said documents were available and within the knowledge of the appellants, or at least the first appellant, at the material time. Hence, it is alleged by the respondent that there was suppression or deliberate suppression of the said documents which form the subject matter of the cross-appeal. The appellants contended the said documents are irrelevant and need not be produced. The appellants denied the claim of suppression or deliberate suppression of the said documents and submitted that the first valuation report of the appellants was put in before the High Court by the respondent's valuer by way of exh. 'D'. According to the appellants, its first valuation report is in respect of valuation of the scheduled land for the purpose of the Securities

Commission. The point missed by the appellants is that the said documents are relevant to show in detail the purpose of the submission of the report to the Securities Commission. In other words, the first valuation report before the High Court is not complete without the said documents now produced by the respondent. This is supported by the second affidavit of the respondent through Azmi bin Abdul Latif dated 7 July 2003, that he was not able to ascertain the actual purpose for which the appellants' first valuation report was commissioned other than that it was submitted for the purpose of the Securities Commission.

Azmi bin Abdul Latif further averred that he was the one who put in the appellant's first valuation report to show the abrupt and unexplained increase in the market value of the scheduled land by about RM3,000 per acre within a space of seven months intervening between the first valuation report and the second valuation report of the appellants.

Azmi bin Abdul Latif further averred that he came to know of the existence of the said documents through the State Legal Adviser, Kedah.

The sale and purchase agreement between the first appellant and Kuala Sidim Rubber Company Berhad in respect of the undivided half share of the scheduled land acquired was produced in a related proceedings in the High Court, Alor Setar *vide* originating summons no. 24-358-1995 pursuant to s. 29(2) of the Act. Kuala Sidim Rubber Company Berhad put up a claim for the compensation money of the undivided 1/2 share as they bought the undivided 1/2 share from the first appellant and therefore the Land Administrator should not have paid to the first appellant, through its managing agents, Boustead Estates Agency Sendirian Berhad ('Boustead') *vide* letter dated 9 April 1995 by way of a OCBC Bank cheque no. 006212 for the sum of RM12,907,000 as compensation (half share). In other words, Kuala Sidim Rubber Company Berhad claims that the compensation should rightly be paid to them.

By letter dated 10 April 1995, Kuala Sidim Rubber Company Berhad through Boustead indicated to the Land Administrator of its intention to apply to the court to set aside the compulsory acquisition of the scheduled land and returned the said cheque to the Land Administrator. Subsequently, a writ of summons was filed in the Alor Setar High Court *vide* suit no. 22-32-1995 to set aside the compulsory acquisition of the scheduled land but on 28 June 1995 the said suit was struck off and Kuala Sidim Rubber Company Berhad did not pursue the matter any further.

All the above facts are disclosed in the affidavit of Ahmad Azhar Shah bin Ibrahim, the Legal and Administrative Manager of Boustead dated 21 May 1999 and exhibited as ZBH10 to the first affidavit of the respondent in support of the motion to adduce further evidence.

According to the affidavit of Azmi bin Abdul Latif (the second affidavit of the respondent), he personally visited the Pejabat Tanah dan Galian Kedah and conducted official land title searches on the titles of the scheduled land ie, Grant No. 8566 (Lot No. 14215) (old Lot No. 8065) and Grant No. 19129 (Lot No. 18479) and in the course of the searches he did not come across or sight of the sale and purchase agreement. The sale and purchase agreement was only disclosed indirectly on 21 May 1999 by the affidavit of Ahmad Azhar Shah bin Ibrahim *vide* originating summons no. 24-358-1995 (exh. ZBH10).

According to the affidavit of Zabudin bin Hat dated 30 June 2003 in support of the motion, the transfer of the first appellant's half share of the scheduled land to Kuala Sidim Rubber Company Berhad was registered only on 20 April 1999 with the Registrar of Land and Mines, Kedah ie, about five years later. (see exhs. ZBH13 and ZBH14). During the inquiry proceedings by the respondent that started on 25 May 1994 the sale and purchase agreement was executed on 8 October 1993 and completed on 21 March 1994 and therefore it should have been disclosed by the first appellant at the inquiry proceedings if not at the High Court proceedings. The appellant's first valuation report for the purpose of the Securities Commission did not also disclose the sale and purchase agreement and the other documents now put in by the respondent. Why the documents were not produced when they were available, only the appellants, or at least the first appellant, can provide the answer. The appellants merely contended that these documents were not relevant for the purpose of the acquisition. With respect, we disagree.

We are of the view that the sale and purchase agreement and the other documents in respect of the scheduled land are material evidence for the purpose of assessing the market value by the Land Administrator and the High Court especially when there is evidence of sale of half of the scheduled land and the basis of the market value of its sale. The issue now is what is the market value of the scheduled land? We have two figures here. From the appellant's first valuation report, it is assessed at RM7,040 per acre. According to the sale and purchase agreement, the purchase price on a willing buyer and willing seller basis is RM6,596 per acre. This purchase price is based on a discount of 6.3% of the open market value of RM7,040 per acre. We are, however, not clear as to the reasons for the discount given for the purchase of the scheduled land. We wish to say, however, that it is common knowledge that it is not easy to get a willing buyer for a large estate as in this case and the

discount given is in all probability for the sale to carry through. According to KSB's circular to its shareholders in respect of the purchase consideration of the estates including half interest in Kuala Muda Estate (scheduled land) "we are of the view that the basis in arriving at the purchase price consideration is fair and reasonable". (pp. 202 and 203 of exh. ZBH3).

Be that as it may, the two valuation reports of the appellants bear the following similarities:

(a) Both valuation reports were prepared by Messrs. Azmi & Co. Sdn Bhd;

(b) The subject matter of the valuation in each report was the Kuala Muda Estate;

(c) All of the lands in question were the same agricultural/estate lands;

(d) Their respective purpose, to establish an estimate of market value of the lands;

(e) The basis of valuation, in both reports, was on "an open market value" assuming a "willing buyer-willing seller" situation;

(f) Both reports took into account the development potential of the lands in question; and

(g) The method of valuation adopted in both reports was the comparison approach.

It is thus clear to us that for reasons best known to the appellants, or at least the first appellant, the sale and purchase agreement, MB's circular and KSB's circular were not disclosed though the documents were available.

Had the learned judge the benefit of the documents produced by way of the additional evidence in support of the respondent's cross-appeal, the learned judge could very well have not affirmed the award of RM10,000 per acre.

As the learned judge's valuation of the market value of the scheduled land is based on the valuation reports of both parties before him and no oral evidence was adduced, the appellate court is entitled to review the valuation reports and to consider the additional evidence which, by consent, was allowed by us. (see *Collector of Land Revenue v. Alagappa Chettiar*.)

One of the recognised methods of valuation of land acquired under the land acquisition legislation is the price paid, within a reasonable time, in *bona fide* transactions of purchases of the land acquired, or of the lands adjacent to the land acquired and possessing similar advantages. (*Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore*).

In this case by way of the additional evidence, it is clear to us there was the sale and purchase agreement of the scheduled land at a price of RM6,596 per acre (after discounting the market value of RM7,040 per acre). In fact, there is uncontroverted evidence that the purchase consideration was on willing seller and willing buyer basis. The sale and purchase agreement was executed on 8 October 1993 and completed on 21 March 1994. The price was based on the open market value by the appellant's valuer at RM45,000,000 on the basis of the market value of RM7,040 per acre. We can therefore accept that the market value of the scheduled land is RM7,040 per acre according to the first valuation report of the appellants. This is about seven months earlier than the date of the acquisition, that is, 3 March 1994.

It would seem clear to us that in view of the proximity of time between the sale and purchase agreement of the scheduled land and the date of the acquisition of the scheduled land, the sale and purchase agreement provides the best guide for assessment of the market value of the scheduled land after making due allowance for all the circumstances. Suffian J (as he then was) cited with approval in *Superintendent of Lands and Surveys, Sarawak v. Aik Hoe & Co. Ltd* [1966] 1 MLJ 243 at p. 247 the following passage from the judgment of Buhagiar J in *Nanyang Manufacturing Co. v. The Collector of Land Revenue, Johore (supra)*:

> I consider that the safest guide to determine the fair market value is evidence of **sales of the same land** or similar land in the neighbourhood, after making due allowance for all the circumstances. (emphasis added)

As we are of the view that the said documents admitted as additional evidence are relevant for the purpose of assessing the market value of the scheduled land and for the reasons stated earlier, the respondent's award and the High Court order affirming it should be set aside.

It now remains for us to do the best we can to arrive at a just assessment of the market value of the scheduled land. The sale and purchase agreement of the scheduled land was executed on 8 October 1993, well before the acquisition date and there is an intervening period of seven months, we then need to take into consideration, *inter alia*, the element of appreciation of the scheduled land. Having said that, the sale of the scheduled land to Kuala Sidim Rubber Company Berhad provides the best guide to assess the market value of the scheduled land and making the necessary adjustments of comparable sales of adjacent or similar lands and also making due allowances for all the circumstances, we are of the view that a fair market value of the scheduled land is RM7,500 per acre.

Having determined the fair market value of the scheduled land, we now need to consider the claim for injurious affection. As we have stated earlier on, the learned judge merely mentioned this claim without considering it. The respondent has not challenged this claim either. Therefore the appellants, in our view, are entitled to succeed under this claim. The question is what is the amount that the appellants are entitled to claim? As we have determined the fair market value of the scheduled land at RM7,500 per acre and taking the basis of the claim on the formula of 30% depreciation of the value of the scheduled land, the amount for the injurious affection would work out to around RM5,000.

Orders

In the circumstances, we make the following orders:

(a) the appeal for increase of the award to RM20,000 per acre is dismissed. However, we award a sum of RM5,000 for injurious affection;

(b) the cross-appeal is allowed and the award is reduced from RM10,000 per acre to RM7,500 per acre;

(c) the difference in the sum between RM10,000 per acre and RM7,500 per acre will carry interest at 8% per annum from the date of full payment to the appellants to date of settlement as per the order of this court;

(d) as the amount awarded by the High Court is substantially reduced by this court, we order the costs of the appeal and the cross-appeal to the respondent. The deposit by the appellants is to go towards the taxed costs and the deposit by the respondent, if any, is to be refunded;

(e) in respect of costs of the motion, there will be no order as to costs as the appellants consented to it.